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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

EDWIN W. EDWARDS, in his Official Capacity as Governor of Louisiana, WILLIAM J. GUSTE, JR., in his Official Capacity as Attorney General of Louisiana, LOUISIANA DEPARTMENT OF EDUCATION, and THOMAS G. CLAUSEN, in his Official Capacity as Superintendent of Education of Louisiana,

Appellants,

v.

DON AGUILLARD *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF

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EDWIN W. EDWARDS *et al.*,

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SUMMARY OF ARGUMENT IN REPLY

The appellees' own brief is a forceful argument that the summary judgment decision below should be reversed on *procedural grounds*, because the appellees' brief is *replete with factual assertions and assumptions*. Those factual assertions and assumptions involve the definition of creation-science, the alleged religious nature of creation-science in contrast to evolution, and the alleged non-scientific nature of creation-science in contrast with evolution. Yet those precise factual issues are *integral to application of the tripart test*. Moreover, the appellees' brief *hardly even discusses* the most important aspect of the procedural issue: the uncontroverted affidavits filed by the State on those factual issues, which must be "taken as true" and "admitted" for purposes of summary judgment and appeal. The reason is the appellees' dilemma: they would admit even more clearly that factual issues are central if they controverted the affidavits and contradicted the hundreds of pages of scientific discussion in the record about the definition and nature of creation-science, yet they must not relent in the drumbeat that creation-science is inherently religious and non-scientific. Their ploy does not cause the uncontroverted affidavits and other material factual issues to vanish, particularly when viewed in the light most favorable to the appellants. Summary judgment simply contradicted unquestioned procedural rules and requires summary reversal.

The appellees' brief also is very interesting for what it chooses to *dodge* on the *constitutional issues*: specific deci-

sions of this Court, the alternative historical test for the Establishment Clause, the actual requirements of the legislative purpose prong, and the actual content of the legislative history. Specifically, the appellees address hardly a sentence to the State's extensive citations showing that reference in public schools to creation is constitutional under both the precedents in *Engel*, *Zorach*, and *Lynch*, and the alternative historical test. They totally *ignore* that the purpose prong of the tripart test is satisfied by "a" secular purpose and certainly does not require an exclusively secular purpose, and that the "legislative" purpose is not found in a single legislator's purpose and particularly not in a non-legislator's purpose. They *dodge* that the most frequent point in the legislative hearings was that balanced treatment furthers students' academic freedom to hear additional scientific information. In summary, the appellees' brief *fails to respond with any authorities* to the clear *factual affidavits and other factual issues that preclude summary judgment* and to the clear *constitutional principles that preclude summary judgment*, requiring reversal.

ARGUMENT IN REPLY

I. SUMMARY JUDGMENT CONTRADICTS UNQUESTIONED PROCEDURAL RULES, THUS REQUIRING SUMMARY REVERSAL, AS SEVEN JUDGES OF THE CLOSELY-SPLIT U.S. COURT OF APPEALS NOTED COMPELLINGLY.

A. The Uncontroverted Affidavits of the State on Factual Issues Settle, for Purposes of Summary Judgment and Appeal, that Creation-Science Is Scientific and Non-Religious, and that Evolution Is No More Scientific or Non-Religious, which Is a Necessary Factual Basis for Applying the Tripart Test.

1. *Preclusion by Uncontradicted Affidavits*

The appellees *almost totally ignore* the uncontradicted affidavits filed by the State on factual issues, other than by appellees' conclusory declaration that the affidavits "contain

conclusory declarations" (Br. 43)[1] that do not raise material factual issues. The *materiality* of the State's factual issues in its very non-conclusory affidavits is shown by the need to resolve those factual issues about creation-science and evolution *before it is possible to apply the tripart test*; the tripart test must be applied to specific subjects and embodies factual predicates.[2] The appellees' contention that the "meanings of words in a statute . . . 'are clear cut questions of law' " (Br. 43) is simply incorrect when the statute incorporates scientific words or other technical words. Their jab at the affiants as "self-described experts" (Br. 43) overlooks impressive credentials.[3] The appellees apparently have found no contrary citations to the uniform procedural rule of this Court and the circuits that uncontroverted affidavits must be "accept[ed] as true" (in Justice Stevens' words)[4] and "admitted"[5] for purposes of summary judgment and appeal.

This entire Court in *Celotex Corp. v. Catrett*[6] appeared to agree with an applicable statement by Justice White:

> Petitioner Celotex does not dispute that if respondent has named a witness to support her claim, summary judgment should not be granted without Celotex somehow showing that the named witness' possible testimony raises no genuine issue of material fact.[7]

The chief judge and six other judges of the Fifth Circuit described the greater barrier to summary judgment from the State's uncontroverted affidavits:

> [T]hese affidavits make a *fact issue* that those propositions are true. For purposes of reviewing the summary

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1. The Brief of Appellees is cited by parenthetical references. Affidavits in the Brief of Appellants are cited by the page number there.

2. Br. of Appellants 12 & nn.43-45 (citing sources).

3. For their credentials, see *id.* at 14 n.53.

4. Wang v. Lake Maxinhall Estates, Inc., 531 F.2d 832, 835 n.10 (7th Cir. 1976). *Accord*, Br. of Appellants 7 n.27 (citing sources).

5. Morrison v. Walker, 404 F.2d 1046, 1048-49 (9th Cir. 1969). *Accord*, Br. of Appellants 7 n.27 (citing sources).

6. 477 U.S. ___, 91 L.Ed.2d 265, 106 S.Ct. ___ (1986).

7. *Id.* at ___, 91 L.Ed.2d at 277, 106 S.Ct. at ___.

judgment which our panel's opinion affirms, then, the proposition stated must be taken as established . . .."[8]

2. *Preclusion by Other Factual Issues*

The appellees also *totally ignore* the other detailed factual issues raised by the State, because of the impossibility of otherwise defending summary judgment. Yet those specific factual issues were raised in the State's answer and trial court memorandum,[9] and were shown to be genuine and material not only by uncontroverted affidavits but by several hundred pages of discussion and more than a thousand citations from noncreationist scholarly articles and books (which are reproduced in the joint appendix).[10] If Rule 56 means anything, it means that such a detailed showing of genuine issues of material fact precludes summary judgment and mandates its reversal.

B. Those Are Factual Issues, as Admitted Implicitly in the Appellees' Brief, Despite Its Scores of Factual Errors; and Are Necessary for Applying the Tripart Test.

The appellees themselves expressly *acknowledge* the *dispute* between the State's statutory definition of creation-science and the appellees' contrary definition (Br. 28), and between the State's description of its "scientific and nonreligious nature" and the appellees' allegations that it "forecloses scientific inquiry" and is "an inescapably religious subject." (Br. 25,28). They also characterize these things as "the *facts* found in the other cases" of *McLean* and *Hendren* (Br. 43)—which the State sharply disputes.[17] The various amicus briefs also hardly could show more clearly the factual disputes. The appellees' own brief and its conclusory assertions highlight the *factual* nature of the dispute as follows.

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8. Aguillard v. Edwards, 778 F.2d 225, 226 (5th Cir. 1985) (Gee, J., dissenting, with six other judges).

9. For locations, see Br. of Appellants 10 n.38.

10. J.A. G44-G56, G57-G723, G724-G901 (citing sources), R. 543, R.D. 77.

17. On *McLean*, see Br. of Appellants 45 nn.216-17. On *Hendren*, see Note, *Freedom of Religion and Science Instruction in Public Schools*, 87 Yale L.J. 515, 559-60, 562-63 (1978).

1. *Factual Disputes on the Definitions of Creation-Science and Evolution*

The appellees make *factual arguments about the definition of "creation-science."* For example, on a single page they define it as "a divine explanation of the universe," "a particular religious belief about the origins of the universe," "an inescapably religious belief," "religious content," a "specific religious conclusion," "religious content," and "a religious explanation of creation." (Br. 2).[18] Their own source (*Webster's Third International Dictionary Unabridged*) gives non-religious definitions of creation besides the one quoted.[19] We have cited many scientific uses and other non-religious uses of creation.[20]

The definition and meaning of "creation" is *not new* or tactical. Use of "creation" to mean "abrupt appearance in complex form" was made more than a century ago by Agassiz of Harvard, by Darwin himself, and by others,[21] who would be most surprised to learn that that definition is *"post-hoc* made-for-litigation" (Br. 43). Seven dissenting judges agreed, as did two evolutionist affidavits, that "creation-science" is "the scientific evidence . . . for the sudden appearance of highly developed forms of life."[22] The legislative record also

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18. *Contra* Affidavits A9, A26-A27, A31, A32, A33, A37-A38, *and* J.A. G44-G56, G57-G723, G724-G901 (citing sources).

19. WEBSTER'S THIRD INTERNATIONAL DICTIONARY UNABRIDGED 532 (1981) (The 3 definitions given are "1. The act of creating; esp. the act of bringing into existence from nothing the universe or the world or the living and nonliving things in it. 2. The act or practice of making, inventing, devising, fashioning, or producing . . .. 3. Something that is created . . ..").

20. Br. of Appellants 16-17 (citing sources); note 18 *supra*.

21. 3 L. AGASSIZ, CONTRIBUTIONS TO THE NATURAL HISTORY OF THE UNITED STATES (1861), *excerpted in* 30 AM. J. OF SCIENCE 142, 149 (1860); N. GILLESPIE*, CHARLES DARWIN AND THE PROBLEM OF CREATION 32 (1979) ("the conventional practice of using the term creation as a synonym for 'appear' or 'originate' "); *id.* at 158 n.10 (same); 2 THE LIFE AND LETTERS OF CHARLES DARWIN 202-03 (F. Darwin* ed. 1903) ("creation, by which I really meant 'appeared' "); E. SHUTE, FLAWS IN THE THEORY OF EVOLUTION 5 (1961); *see* C DARWIN*, THE ORIGIN OF SPECIES 46 (1859, repr. 1964) ("Our classifications will come to be . . . genealogies; and will truly give what may then be called the plan of creation."). Noncreationists are marked with asterisks.

22. Aguillard v. Edwards, 778 F.2d at 226.

gives this definition. At the least, this and other issues are factual issues that preclude summary judgment.

The appellees also raise *factual issues about the definition of evolution*. They incorrectly argue that " 'evolution' is 'a process of continuous change from a lower, simpler or worse condition to a higher, more complex or better state' " (Br. 26), rather than (in the words of their expert witness) that it is necessary to "distinguish[] between evolution and mere change," and that evolution includes that "[t]he millions of diverse living species we find around us in the modern world are all descended from a *common ancestor*."[23] That descent occurred "from primordial life, through unicellular and multicellular organisms, invertebrate and vertebrate animals, to man."[24] They make the erroneous factual argument that "[e]volution thus deals not with origin" and merely is "a scientific theory of change" (Br. 26) (*contra* Affidavits A9, A27, *and* J.A. G40-G41, G35-G39, G388-90, G491-96).

2. *Factual Disputes on the Scientific Nature of Creation-Science and Evolution*

The appellees raise a number of other *factual issues about the scientific nature of creation-science*, which they make no effort to view in the most favorable light provided by the State's affidavits and documented statements. What could be more factual than the following assertions by the appellees: " '[c]reation-science' forecloses scientific inquiry" (Br. 25) (*contra* Affidavits A14-A17, A21-A24, A27, A33, *and* J.A. G71-G72, G73-G168, G356-87, G457-90); "is not subject to experiment" (Br. 25) (*contra* Affidavits A33, *see* A21, A24, A27, *and* J.A. G657-65); "cannot be proved untrue" (Br. 26) (*contra* Affidavits A33, *and* J.A. G677-84); "necessarily rests on the unobservable" (Br. 27) (*contra* Affidavits A14-A17, A21-A24, A27, A28, A33, *and* J.A. G73-G168, G356-87, G457-90); etc. The appellees give a sophomoric definition of "sci-

23. T. Dobzhansky*, F. Ayala*, G. Stebbins* & J. Valentine*, Evolution 8 (1977); F. Ayala* & J. Valentine*, Evolving: The Theory and Processes of Organic Evolution 1 (1979). *Accord*, J.A. G169-G175 & n.193.

24. Dobzhansky, *Evolution*, 10 Encyclopedia Americana 734, 748 (1982). *Accord*, J.A. G172 n.196; Affidavits A9, A27.

ence" (Br. 25), which itself is a factual issue,[25] contrary to the factual issues raised by the State in its trial court memorandum on that definition (constituting 187 pages of the joint appendix with 246 citations).[26] They pontificate that "[s]cience demands inquiry into the 'sources and causes' of a particular phenomenon" (Br. 29), but ignore that inquiry is not the issue but feasibility is in addressing the source of both creation *and* evolution from an empirical standpoint.[27]

Examples of "the *scientific evidence* . . . for sudden appearance," as the seven dissenters described it,[27a] were given with hundreds of citations from non-creationist scientific books and articles.[28] The evidences include the abrupt appearance of categories of fossil plants and animals; the systematic gaps between fossilized categories of life; the systematic similarity between fossil plants or animals and (if any) their modern-day descendants; the vast information content of modern plants and animals; and the genetic barriers to viable and progressive change.[29] Each of these evidences is better explained by creation-science than by macroevolution from a few single-celled forms to all living plants and animals.[30] And each of these evidences is manifestly scientific and non-religious.

The appellees also *factually question* the "ostensible 'crisis' in the widely-accepted theory of evolution" (Br. 38). However, "*evolution theory is in crisis,*" in the words of noncrea-

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25. *See* Aguillard v. Treen, No. 81-4787 at 5 (E.D. La. Jan. 10, 1985) (Supp. App. to Jurisd. Statement B7); Affidavits A32-33; J.A. G524-G711.

26. J.A. G524-G711 (citing sources).

27. J.A. G759, G571-72, G651-54 (citing sources); Affidavits All.

27a. Aguillard v. Edwards, 778 F.2d at 226.

28. J.A. G66-G168, G356-87, G457-90 (citing sources).

29. Affidavits at A14-A17, A21-24, A27, A28; J.A. G57-G168, G356-87 (citing sources).

30. Affidavits at A8-A9, A14, A17, A21; J.A. G71, G93, G122, G131, G460 (citing sources). For example, Lipson* (an Agnostic and evolutionist) writes that "the only acceptable explanation is creation," and that "the experimental evidence supports it." Lipson*, *A Physicist Looks at Evolution*, 31 PHYSICS BULL. 138,138 (1980); Br. of Appellants A44, A46.

tionist scientists Saunders* and Ho* and many others,[31] and "evolution is not established fact," in the words of the dissenting judges on the Fifth Circuit.[32]

3. *Factual Disputes on the Non-Religious Nature of Creation-Science and Evolution*

The appellees monotonously repeat a comparable number of conclusory *factual claims about the alleged religious nature* of creation-science and evolution, with no mention of the affidavits and no illumination by the most favorable light. What could be more factual than their contentions that *creation-science* "can exist only in the ambience of faith" (Br. 27) (*contra* Affidavits A14-A17, A21-A24, A27, A28, A33, *and* J.A. G60-G523, G896-99); "signifies support for the *particular* version of creation in Genesis" (Br. 26) (*contra* Affidavits A32, A38-39, *and* J.A. G822-81); and is instruction in "the 'evidences for' a belief in a Creator" (Br. 27) (*contra* Affidavits A33, *and* J.A. G60-G523, G757-62. They *ignore* the statutory requirement for "nonreligious library books." [32a] Remaining as inaccurate as in their definition of science, the appellees give a definition of "religion" as "one's views of his relations to his Creator" (Br. 27), thereby quoting this Court out of context (because the definition continued "and to the obligations they impose of reverence for his being and character, and of obedience to his will"[33]), in an 1890 decision with a restrictive definition that is not normally followed.[34] Creation-science does not necessitate teaching about a creator,[35] much less about one's relations to and obligations from a creator—a factual issue. It "has no direct religious reference

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31. *E.g.*, Ho* & Saunders*, *Preface* to BEYOND NEO-DARWINISM ix, ix (M. Ho* & P. Saunders* eds. 1984). *Accord*, M. DENTON*, EVOLUTION: A THEORY IN CRISIS (1986); Affidavits at A14, A27, A28.

32. Aguillard v. Edwards, 778 F.2d at 226.

32a. La. Rev. Stat. § 17:286.6, Br. of Appellants A43.

33. Davis v. Beason, 133 U.S. 333, 342 (1890).

34. *E.g.*, United States v. Seeger, 380 U.S. 163, 187 (1965) (construction of term "religion" in statute); Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579-604 (suggesting "ultimate concerns," "extratemporal consequences," or "transcendent reality").

35. Affidavits at A33, A37-A38; Br. of Appellants 17-18 & n.70 (citing sources).

whatever and merely requires that the whole scientific truth be taught," in the words of the seven dissenters.[35a]

The appellees claim that "instruction in the scientific theory of *evolution* is constitutionally neutral" (Br. 34) (*contra* Affidavits A34, A38, *and* G800-18, G822-66). They also give a very false impression with their quotations about creation-science. They quote a reference to a "Designer" (Br. 29), but fail to point out that the source is not an affidavit but a published scientific article of an Agnostic evolutionist, who opposes creation-science but concedes that "the experimental evidence supports it."[36] They doctor a quotation, to add references to "Genesis" and a "Flood" (Br. 29), for another Agnostic evolutionist who supports balanced treatment and who concedes that "creation-science is scientific, nonreligious, and educationally worthwhile."[37]

II. THE LOUISIANA BALANCED TREATMENT ACT IS CONSTITUTIONAL, THUS REQUIRING REVERSAL, AS SEVEN JUDGES OF THE SHARPLY-SPLIT U.S. COURT OF APPEALS ARGUED FORCEFULLY.

A. Balanced Treatment for Creation-Science and Evolution Is Constitutional in Light of This Court's Decisions, as the Seven Dissenting Judges Implicitly Recognized.

Under various decisions of this Court and under the alternative historical test of this Court, balanced treatment "does not infringe the Constitution," as the seven dissenters implicitly found.[38] In regard to the *Engel*,[39] *Zorach*,[40] and *Lynch*[41]

35a. Aguillard v. Edwards, 778 F.2d at 227.

36. Lipson*, *A Physicist Looks at Evolution*, 31 PHYSICS BULL. 138, 138 (1980); Br. of Appellants A44, A46.

37. Affidavit of Morrow* 2, Br. of Appellants A25, A26.

38. Aguillard v. Edwards, 778 F.2d at 226.

39. Engel v. Vitale, 370 U.S. 421, 435 n.21 (1962).

40. Zorach v. Clauson, 343 U.S. 306, 312-13 (1952).

41. Lynch v. Donnelly, 465 U.S. 668, 676 *passim* (1984).

decisions allowing public school reference to a creator,[42] the only *feeble response* that the appellees can muster is that creation-science "manipulates belief or disbelief in God" (Br. 30), which is a factual issue, contradicts the affidavits, and is just simply wrong because creation-science need not address the existence of God any more than evolution must. In regard to the *alternative historical test* and the massive historical evidence, the only feeble answer is *ignoring* the nonexclusive nature of the tripart test,[43] while asserting that there were no public schools in 1789 (Br. 41 n. 6). That, of course, overlooks the public schools existing in New England, being established under the land grant in the Northwest Ordinance, and soon to be founded in the District of Columbia.[46]

B. Balanced Treatment for Creation-Science and Evolution Is Constitutional under the Legislative Purpose Prong of the Tripart Test, because the Legislative Purpose Was To Advance "Academic Freedom" for Students To Hear Additional Scientific Evidence, as Expressly Stated in the Words of the Statute, as Constantly Reaffirmed in the Official Legislative Transcripts, and as Acknowledged by the Seven Dissenting Judges.

It is difficult to imagine what could advance academic freedom of students more than providing additional scientific information, or what could deny academic freedom to students more than depriving them of additional scientific information

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42. Reference to a creator is not necessary to or part of instruction in creation-science.

43. Br. of Appellants 29 n.134 (citing sources).

46. Northwest Ordinance, 1 Stat. 50 (1787) ("Religion, morality and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."); Wilson, *Eighty Years of the Public Schools of Washington*, in 1 RECS. OF COLUM. HIST. SOC. 119, 122-23, 127 (1897) (District of Columbia public schools, under Jefferson as first president, referred to "Creator" and "God").

and an alternate scientific viewpoint on a controversial issue. Regardless of how much smoke the appellees blow about forbidding evolutionary instruction or mandating religious instruction, the clear words of the statute simply say that "public schools within this state shall give balanced treatment to creation-science and to evolution," and that " 'creation-science' means the scientific evidences for creation and inferences from those scientific evidences."[47] The official legislative history agrees. The seven dissenting judges were right: "requiring the truth to be taught on any subject displayed its own secular warrant."[48]

1. *Singularity and Sources of Legislative Purpose*

The appellees have conveniently *ignored* the principle that this "Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but *only* when it has concluded there was *no question* that the statute or activity was motivated *wholly* by religious considerations. See, *e.g.*, *Stone v. Graham* . . . ; *Epperson v. Arkansas* . . . ; *Abington School District v. Schempp* . . . ; *Engel v. Vitale* . . .."[49] Note that *Epperson* itself involved a "sole reason" or purpose of excluding evolution and teaching the "Genesis account" of creation.[50] The appellees *ignore* that aspect of *Epperson*, while misconstruing its applicability to this case (Br. 35), in which the question is balanced treatment of creation-science with a secular purpose, rather than exclusion of evolution but not Genesis and with a "sole" religious purpose.[51]

The appellees also have *overlooked* the proper *hierarchy of informational sources* about the legislative purpose, and particularly the point that the view of one legislator, even if a legislative sponsor, is simply not the same as the "legislative purpose."[52] That hierarchy looks first to the stated purpose[53];

47. La. Rev. Stat. § 17:286.3(2) & .4(A), Br. of Appellants A41.

48. Aguillard v. Edwards, 778 F.2d at 228.

49. Lynch v. Donnelly, 465 U.S. at 680 (emphasis added). *Accord*, Br. of Appellants 34 n.154 (citing sources).

50. Epperson v. Arkansas, 393 U.S. 97, 105, 107 (1968).

51. Br. of Appellants 44-45 (citing sources).

52. *E.g.*, CPSC v. G.T.E. Sylvania, 447 U.S. 102, 118 (1980). *Accord*, Br. of Appellants 43 n.201 (citing sources).

and if it is unclear (which is not the case here), then to legislators' statements as a whole in the official legislative record; and only if those are unclear (which is not the case here), then to witnesses' statements as a whole in the official legislative record. If a "social context" (Br. 25) is relevant at all, it is relied on *only* if the text and legislative transcripts are unclear, and is relied on *only* as it involves the specific state rather than unrelated localities; and it requires *factfinding*. The appellees all but ignore the stated purpose and totally ignore most explicit statements in the legislative transcripts (as discussed in our principal brief).[54]

The seven judges on the Fifth Circuit correctly criticized the district court and panel decisions and particularly the imagined "social context" as follows:

> This approach effectually makes a farce of the judicial exercise of discerning legislative intent. . . . To disregard so completely the existing manifestations of intent and impose instead one's personal subjective ideas as to what must have been the true sentiment of the Louisiana legislature ignores this constitutional restraint on judicial power.[55]

2. *Overwhelming Evidence of a Secular Legislative Purpose*

More importantly, the appellees paint a very *misleading picture* of the actual primary evidence about the legislative purpose. First, the statute itself states its "purpose of protecting academic freedom."[56] Second, the official legislative history of the 1981 act is replete with evidence of a sincere desire to protect students' academic freedom to hear additional scientific information. The State's principal brief quotes and cites numerous legislators as well as expert witnesses on their pervasive themes: that balanced treatment advances academic freedom of students,[56a] that exclusive in-

53. Br. of Appellants 34-35 & n.160 (citing sources).

54. Br. of Appellants 36-42 (citing sources). *Accord*, nn.56a-56c *infra*.

55. Aguillard v. Edwards, 778 F.2d at 227.

56. La. Rev. Stat. § 17:286.2, Br. of Appellants A41.

56a. *E.g.*, E311, E380, E427, E429, E512-14, E516-17, E526-27, E551, E553, E613, E635; *see id.* E18, E21, E22, E23, E34-35, E37, E42, E60, E97, E98, E219, E276, E280, E282-83.

struction in evolution hinders that academic freedom, that creation-science consists of scientific evidence to the same extent as evolution,[56b] and that creation-science is as non-religious as evolution.[56c] Third, the expert witnesses, in addition to the legislators, made these points at every single hearing.[57]

a. *Diversionary Approaches of the Appellees*

The appellees, confronted with that mound of evidence that more than establishes "a secular purpose" for the Balanced Treatment Act,[58] are forced to argue along *six diversionary lines*. First, they emphasize the *academic freedom of teachers* (and all but one of their citations involve the university level where teachers' academic freedom is broader[58a]), rather than the academic freedom of students that the Act manifestly addresses, as its legislative history shows.[58b] They correctly state that "[n]o Louisiana law impeded instruction in any scientific data" (Br. 33), but fail to state that their own poll of school superintendents showed that the scientific evidence constituting creation-science was not being taught (a *factual* matter),[59] and that their own legal position threatened any teacher who dared teach that scientific evidence. The legislature clearly assumed that most teachers would choose to present both scientific explanations and thus additional scientific data—and the correctness or incorrectness of that assumption is a *factual matter* for trial rather

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56b. *E.g.*, E308, E309, E310, E311, E327, E329, E330-31, E416, E417, E420, E423-25, E427, E428, E454, E492, E493, E495, E497, E498, E501, E510-11, E530, E533, E616, E635; *see id.* E3, E12, E22, E35, E39, E42, E44, E56, E76, E98, E282-83.

56c. *E.g.*, E309-10, E313, E401, E408, E415-16, E417, E437-38, E491-92, E493, E498; *see id.* E5, E12, E35, E101, E280, E282.

57. *Id.* at 37 & nn.172-73, 37-38 & nn. 176-77, 39 & nn.182-83 (citing sources).

58. Br. of Appellants 36-42 (citing sources).

58a. *E.g.*, Goldstein, *The Asserted Constitutional Right of Public School Teachers To Determine What They Teach*, 124 U. PA. L. REV. 1293, 1339-49, 1355-56 (1976); Mercer v. Michigan State Bd. of Educ., 379 F.Supp. 580, 586-87 (E.D. Mich.), *aff'd mem.*, 419 U.S. 1081 (1974). They ignore the broad discretion given to teachers. La. Rev. Stat. § 17:286.3(1).

58b. *E.g.*, J.A. E514, E516-17, E553; *see id.* E18, E21, E23, E98, E219, E282-83.

59. J.A. E782, E798.

than summary judgment. Moreover, the legislature did not limit the teaching of any additional scientific explanations of origins that might be articulated by scientists.

Second, the appellees focus on the legislative history of the *1980 bill that was rejected*, much more than on the history of the 1981 bill that was adopted. To state that diversion is to show its fallacy, because the Louisiana legislature clearly chose to reject improper wording and testimony that conflicted with a requirement to teach science without religious content. Third, the appellees stress the *provisions of the 1981 bill that were rejected* (such as its faulty illustrations of creation-science that were unanimously deleted because "[m]aybe there are some things in here that ought not have been included"[60]), more than its aspects that were enacted. Again, to state the diversionary tactic is to expose its misleading effect. The legislature manifested its intent to reject identification of creation-science with such concepts as "kinds," a "worldwide flood," and a "relatively recent inception," and instead to identify creation-science simply with "scientific evidences for creation' and "nonreligious" books, as the actual statute says.

Fourth, the appellees try to identify the legislative purpose with the *out-of-context remarks of one legislative sponsor*, rather than discussing the other 96 legislators who voted for the Act or the other 3 sponsors. "Ordinarily even the contemporaneous remarks of a single legislator who sponsors a bill are not controlling in analyzing legislative history."[61] Fifth, the appellees focus on *people outside of the legislature and in fact outside of Louisiana*, whose own views are not reflective of the "legislative purpose," more than on actual legislators. There is no question that someone in the country can be found to express almost any religious view of creation or evolution, and that there are various creationist and evolutionist organizations that wish to influence public school instruction. However, this Court has stressed that the views of "adherents of particular faiths and individual churches" on

60. J.A. E438.

61. CPSC v. G.T.E. Sylvania, 447 U.S. 102, 118 (1980). *Accord*, Br. of Appellants 43 n. 201 (citing sources).

such "public issues" are not generally relevant to a "legislative purpose,"[62] which is the crux of Establishment Clause inquiry. Sixth, the appellees cloud over the legislature's purpose with a "*social context*" that could hardly be more selective or more a *factual issue*, leaving out the religious opposition to creation-science[63] while describing some religious opposition to evolution.[64] Moreover, the appellees give a misleading impression of the meaning or context of many of the statements they quote, as the following discussion indicates.

b. *"Statement of the Case" of the Appellees (Br. 3-6)*

The appellees' "statement of the case" is the farthest imaginable thing from a statement of facts. Their claim that the Balanced Treatment Act (which they misname "the Creationism Act") is "the *latest chapter in a struggle* by Biblical literalists to banish evolution from the classroom" (Br. 3), does not (and could not) identify a *single* instance in Louisiana history of such a mythical "struggle," or connect the scattered instances of creationist activity in other states into such a mythical conspiracy (*factual issues*). Instead, Louisiana has never passed an antievolution law (unlike Arkansas), and its legislature was never lobbied by out-of-state forces.[65] The appellees' allegation that the conspirators "returned with Genesis repackaged as 'scientific creationism' " (Br. 3), connects actors in the 1920s and the 1980s (in different states) as irrationally as an assertion that economic protectionists are the same movement in the 1920s and the 1980s. That simply ignores the essence of creation-science as scientific data (as dis-

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62. Walz v. Tax Comm'n, 397 U.S. 664, 760 (1970). *Accord*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-12, at 866-67 n.20 (1978); McDaniel v. Paty, 435 U.S. 618, 641-42 n.25 (Brennan, J., concurring); Choper, *The Religion Clauses of the First Amendment*, 41 U. PITT. L. REV. 673, 683-84 (1980) ("Surely, legislation is not invalid simply because a religious organization supported or opposed it."); Seldman, *The Establishment Clause and Religious Influence on Legislation*, 75 NW. U. L. REV. 944, 948-49 (1980).

63. *E.g.*, IS GOD A CREATIONIST? THE RELIGIOUS CASE AGAINST CREATION-SCIENCE (R. Frye* ed. 1983); Br. of Appellants 23 & nn.95-101.

64. There is substantial scientific opposition to evolution. J. A. G175-79, G199-G204 *passim*.

65. The only exception is three letters from an individual, Mr. Paul Ellwanger, to Sen. Bill Keith, as discussed *infra*.

cussed *supra*), and unfairly attributes tactical motives to well-meaning advocates of academic freedom. Their list of three (only three) other "attempts to place 'creationism' in the classroom" (Br. 4n.1) omits to mention that each involved Genesis rather than creation-science and was in another state.[66] That is as irrational as a claim that a nonsecular purpose behind one state's criminal law against theft would show a nonsecular purpose for the other states' laws against theft.

The appellees' claim that "none" of the seventeen other Louisiana statutes *prescribing courses of study*[67] "mandates equal time for opposing opinions within a specific area of learning" (Br. 4) overlooks the Louisiana balanced treatment law for free enterprise and other economic beliefs.[68] It also overlooks Louisiana's specific content requirements and exclusions in its sex education law.[69] Nearly every state has prescribed courses of study,[70] and this Court has acknowledged that right even in *Epperson*.[71]

The appellees' cavil that "the *statute is silent* on the meaning of 'creation,' and leaves unidentified the 'evidences' " (Br. 5), is a perfect reason why a trial is necessary and why summary judgment was improper, although the uncontroverted affidavits answer those *factual questions* for summary judgment and appeal. The thing that "restricts the inferences the teacher may include" (Br. 5) is the scientific definition of creation-science, as well as the Establishment Clause.

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66. Daniel v. Waters, 515 F.2d 485, 487 (6th Cir. 1975) ("equal . . . emphasis . . . to Genesis"); Wright v. Houston Indep. School Dist., 366 F. Supp. 1208, 1211 (S.D. Tex. 1972), *aff'd per curiam*, 486 F.2d 137 (5th Cir. 1973), *cert. denied*, 417 U.S. 969 (1974) ("explanation derived from the Bible"); Hendren v. Campbell, No. S577-0139, mem. op. at 10 (Ind. Super. Ct. Apr. 14, 1977) ("book is replete . . . with references to biblical topics").

67. La. Rev. Stat. § 17:271 *et seq.*; *see* Aguillard v. Treen, 440 So.2d 705 (La. 1983) (upholding Balanced Treatment Act as a prescribed course of study).

68. La. Rev. Stat. § 17:274.

69. *Id.* § 17:281. *Accord, id.* § 17:262-63 (harms of substance abuse).

70. *E.g.*, Sheldon, *Legislative Control over Public School Curriculum*, 15 WILLAMETTE L. REV. 483 (1979) (listing statutes); 68 AM. JUR. 2D *Schools* § 283 (1973).

71. 393 U.S. at 105, 107.

The appellees disingenuously suggest that "teachers were free to tutor students on *all natural phenomena* and on all ways science explains those phenomena" (Br. 6), but fail to mention that they would always disqualify explanations involving creation as either not "natural phenomena" or not "scientific." They also omit that teachers generally are not "tutoring students on all natural phenomena" but only on those supporting evolution; classrooms generally omit sudden appearance, systematic gaps in the fossil record, information science and probability considerations, chemical tendencies away from synthesizing life, and other such scientific phenomena that constitute creation-science (*factual issue*).[72] The State will offer *factual* testimony at trial by Louisiana teachers and other experts on these issues, and settled these issues for summary judgment by its affidavits.

c. *Distortions about the 1980 Bill (Br. 7-13)*

The appellees devote seven pages (Br. 7-13) to the 1980 bill that the legislature *rejected* (which bill is of marginal relevance as discussed in our principal brief), but even that discussion is misleading and out of context. The term "creation ex nihilo" (from nothing) that appeared in the 1980 bill was rejected in the 1981 bill and act. Sen. Keith did *not* "use interchangeably" (Br. 7) the terms "creation ex nihilo" and "scientific creationism," as the transcript shows. Neither did he describe his son's altercation with a teacher, who threatened the twelve year old boy for saying "God created the world," as an example of creation-science, but as an example of anti-religious discrimination against a student's personal beliefs for not "recant[ing] and say[ing] that it came forth from some evolutionary force."[73]

The "lead witness" for the 1980 bill who is quoted (Br. 7-8) was *not* invited back to testify at hearings on the 1981 bill, and his viewpoint was rejected in the terminology of the Balanced Treatment Act. The "one witness" who made a religious statement (Br. 9) was a single citizen who showed up at a committee hearing and was not part of Keith's presentation;

72. Affidavits at A25, A29, A40; J.A. G932-41 (citing sources).
73. J.A. E74-E75.

and he was evidently not even aware of who she was or that she would speak.[74] Dr. Boudreaux, one of the Louisiana professors who spoke in favor of balanced treatment, is quoted for a page from written statements that were not orally read at the hearing (Br. 9-10), but the appellees do not quote his actual language at the legislative hearings affirming that creation-science is scientific, consists of scientific data, and is not religious.[75] The appellees also mischaracterize the Pro-Family Forum statement (Br. 10-11), by failing to quote the actual oral testimony of the Forum representative that creation-science consists of scientific evidence and that its teaching furthers academic freedom.[76]

No witness said that "the two authoritative sources on 'creation-science' are the Institute for Creation Research and the Creation Research Society" (Br. 11); the appellees evidently made that up in order to bring California and Michigan straw men into Louisiana and to prejudice the issue. Nor are the quoted beliefs of officers of those organizations meant to be statements of creation-science (Br. 11-12). While "3,000 pastors" may have agreed with the Balanced Treatment Act (Br. 13), many opposed it as is evident in the opposition testimony and the plaintiff role of the Louisiana Interchurch Conference and numerous ministers. In any event, the views of "adherents of particular faiths and individual churches" on such "public issues" are not relevant to the legislature's purpose.[77]

The personal motivation of *Mr. Paul Ellwanger* (Br. 12-13) is *irrelevant* to the legislative purpose.[78] He never testified or

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74. J.A. E24 (Keith already had "conclude[d] our presentation").

75. J.A. E321, E429, E501, *see* E44, E60 *passim*. The following citation (J.A. E579-80) is from an opponent rather than a supporter of the bill.

76. J.A. E98, E101 ("The students have a right to know there is an alternative creationist point of view . . .. We are not asking that religion be presented in the classroom but . . . that scientific evidences supporting both of these alternative points of view be presented").

77. Walz v. Tax Comm'n, 397 U.S. 664, 760 (1970). *Accord*, *supra* note 62.

78. His personal religious views did not necessarily provide his motivation for developing a model bill for balanced treatment; they do not become Keith's individual purpose for introducing Ellwanger's bill (which Keith and the legislature essentially rewrote); and they have nothing at all to do with the legislature's purpose in enacting the Balanced Treatment Act.

submitted statements for any legislative hearing, evidently never communicated with any other legislator besides Sen. Keith, and only communicated with Keith by three letters.[79] Although Ellwanger did submit a draft bill to Keith, the legislature with Keith's support buried that bill in committee in 1980 and essentially rewrote it in 1981. Further, the context in Ellwanger's three letters was a desire "for redress of a grievance" arising from exclusively teaching evolution and excluding creation-science (the first letter),[80] and for adding "scientific evidences" to the curriculum while prohibiting "Biblical creationism" (the second letter):

> Quite simply, scientific creationism could, just as evolution is, be called a theory, based on *scientific evidences* and inferences drawn from those evidences by creation-scientists. *Biblical creationism*, on the other hand, is a faith, based on what the Bible tells us about origins, and as such it is *prohibited by this bill.*
>
> . . .
>
> Biblical creationism, in addition to being prohibited by this bill, is really *a matter for the home and the churches. . . .*[81]

Although the appellees have implied that he had a "Fundamentalist" motivation, Ellwanger was in fact a Roman Catholic who encountered fundamentalist opposition.[82]

d. *Distortions about the 1981 Bill (Br. 14-20)*

The appellees attempt to *explain away* the *legislature's deletion* of the faulty illustrations of creation-science (Br. 14), but the fact remains that the stated reason was that "[m]aybe there are some things in here that ought not have been included,"[83] and also that the deletion was not objected to by any legislator or supporting witness.[84] While that dele-

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79. J.A. E749, E753, E762.

80. Letter from P. Ellwanger to B. Keith, J.A. E751.

81. Letter from P. Ellwanger to B. Keith, J.A. E759.

82. Ellwanger, *Are Creationists Second Class Christians and Jews? Are Christians and Jews Second Class Citizens?*, Christian News, May 24, 1982, at 9 (quoted in G979-80). *Accord*, Deposition of P. Ellwanger, Keith v. Louisiana Dep't of Educ., 553 F. Supp. 295 (M.D. La. 1982) (that deposition was admitted into the record in this action, R.527).

83. J. A. E438.

tion indeed was "not intended to try to gut" the requirement for balanced treatment of creation-science and evolution (Br. 16), that does not make the illustrations less faulty or diminish the crucial point that they were unanimously deleted. The legislative deletion of a prohibition on "reference to the bible or other religious texts" in public schools (while keeping the reference to "nonreligious library books") was not because of a desire to allow "use of Biblical writings in 'creation-science' instruction" (Br. 27), but because the wording would forbid such reference in *any* public school class even if "presented objectively as part of a secular program of education."[85] There was no legislative "reliance . . . on the Arkansas statute" (Br. 27), as is evident in a comparison of the texts of the two laws, which differ in most paragraphs.[86]

The "*voices of legislators* who supported the bill" (Br. 16-18) do not represent the large number of legislators that the large number of quotations would imply, but eight quotations from Sen. Keith, one from an opponent, and only two from the other 96 supporters of the bill. Not many of the statements are meant as descriptions of the bill and its requirements, nor is concern with "secular humanism" merely a "Fundamentalist" concern (a *factual issue*);[87] and all must be viewed in light of the many statements by other legislators and witnesses that stressed students' academic freedom and additional scientific data.[88]

The highly selective citations from "the *press*" (Br. 19) have no relation to the "legislature's purpose," and according to a recent political science study may have been out of step with the Louisiana legislators and citizenry.[89] The *questionnaire* (Br. 20) is also irrelevant to the legislature's purpose, is not meaningful because the immediately preceding question showed that 74% of the superintendents had "no knowledge" or "limited knowledge" about creation-science,[90] and is not a measure of the views of teachers.

CONCLUSION

For these reasons, the Court should summarily reverse the summary judgment below on procedural grounds, or reverse it on the constitutional merits, to allow a trial.

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84. J.A. E442.

85. J.A. E441; School Dist. of Abington Township v. Schempp, 374 U.S. 203, 225 (1963).

86. R. D. 77 Ex. 6-7, R. 544.

87. *E.g.*, D. EHRENFELD, THE ARROGANCE OF HUMANISM (1981) (Oxford U. Press).

88. Br. of Appellants 36-42 (citing sources).

89. *E.g.*, S. LICHTER, S. ROTHMAN & L. LICHTER, THE MEDIA ELITE AMERICA'S NEW POWERBROKERS (1986).

90. J. A. E798. Another 4.7% did not respond. *Id.*

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CERTIFICATE OF SERVICE

(Pursuant to S.Ct.R. 28.5(b))

I hereby certify, as a member of the bar of the Supreme Court of the United States, that on this 3rd day of December 1986, three copies of the brief of appellants were served by first class mail (* one by Airborne Express) with the envelope duly addressed and with postage prepaid to the attorneys of record of all other parties of record as follows:

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I further certify that service is not required on any other persons, and that all parties required to be served have been served. Rule 28.

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